IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO.8/2002

M/s. Praveen Enterprises, a
Partnership Firm registered
under Indian Partnership Act,
having its registered office
at Curia Building, Station Road,
Margao, Goa represented by its
partners :

a) Shri Prakash Ramnath Volvatkar,

b) Miss. Nirmala Ramnath Volvatkar,

Both residing at Gudi-Paroda,
Quepem, Goa. ..... Appellants.

V/s.

Konkan Railway Corporation Ltd.,
a Public Limited Company,
A Government of India Undertaking,
with its Branch Office at
Rawanfond Road Overbridge,
Rawanfond, Navelim, Goa. ..... Respondents.

Mr. Sudesh M.S. Usgaonkar, Advocate for the appellants.

Mr. E. Afonso, Advocate for the respondents.

CORAM : F.I. REBELLO, J.

DATE : JULY 3, 2003.

ORAL JUDGMENT:

A reference was made to the learned Arbitrator wherein an objection was raised to the composition of the Arbitral Tribunal. The learned Tribunal considering Section 16 of the Arbitration and Conciliation Act, 1996, (hereinafter, referred to as 'the Act') held that the Tribunal was not constituted in accordance with the

agreement between the parties and consequently held that the Arbitral Tribunal is not in accordance with the Agreement, and as such, could not adjudicate the dispute. It is this order which is challenged before this Court in an appeal filed under Section 17 of the Act.

2. The arbitral Clause 63.3(a)(ii) reads as under:

> "Two Arbitrators, who shall be Corporation Officers of equal status to be appointed in the manner laid down in Clause 63.3(b) for all claims of Rupees Five Lakhs and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The Chairman & Managing Director shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the Two Arbitrators being divided in their opinions, the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 63.3(b) for his decision."

Earlier in an application for reference under

Section 11 of the Act, the Learned delegate of the Chief Justice on an application by the respondents herein to appoint an arbitrator on failure by the Respondents to make a reference to the Arbitral Tribunal, referred the matter to a sole Arbitrator by his Order dated 16.3.2000. The amount involved was more than Rs.5.00 lakhs. The Arbitral Tribunal, in terms of the agreement, had to be constituted in terms of Clause 63.3 (a)(ii). The order passed under Section 11 after the Judgement in Konkan Railway Corporation Ltd., and anr. v Rani Construction Pvt. Ltd., (2002) 2 SCCs 388 is non-adjudicatory. It was, therefore, open to the learned Tribunal under Section 16 to decide, amongst other issues, as to whether the Arbitral Tribunal was properly constituted.

3. The Apex Court considering Section 11 in the case of Datar Switchgears Ltd., v. Tata Finance Ltd., and anr., (2000) 8 SCCs 151, has held that on failure by the party who has to nominate the Arbitrator, to make appointment within a reasonable time, in circumstances not covered by Section 11 or at any rate if the Arbitrator is not nominated before a party moves under Section 11, after reasonable time, it is the learned C.J. or his delegate under Section 11 of the Act who assumes jurisdiction to constitute the Arbitral Tribunal. That does not mean that under Section 11, the

delegate can act beyond the terms of the contract so far as composition is concerned. Section 10 of the Act provides the composition of the Tribunal and how is to be constituted. The Agreement is of the year 1992 i.e. before the Act of 1996 came into force. The agreement provides for appointment of the Arbitrator and an umpire. Therefore, under Clause 63.3(a)(ii), the Umpire, will have to be considered as the third Arbitrator, to be appointed by the two other Arbitrators. Considering that the learned Arbitral Tribunal was right in holding that the Tribunal was not properly constituted.

4. Once the amount was more than 5.00 lakhs, the Arbitral Tribunal had to be constituted of three members. That has not been done. In the circumstances, I find no error in the order of the learned Tribunal and consequently, there is no merit in this appeal. The same is rejected. No order as to costs.

F.I. REBELLO, J.

ssm.